CITA MARINE SDN BHD

v.

PROGRESSIVE INSURANCE BHD & ORS

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD JC
[SUIT NO: 22-98-99 (MR)]
28 AUGUST 2000

CIVIL PROCEDURE: *Jurisdiction - High Court - Insurance claim - Defendant's refusal to settle insurance claim - Whether Sarawak Limitation Ordinance applicable in determining cause of action - Courts of Judicature Act 1964, s. 23(1)(a), (b) and (c) - Whether High Court of Malaya in Kuala Lumpur or High Court of Sabah and Sarawak at Miri has jurisdiction to try action*

CIVIL PROCEDURE: *Jurisdiction - Forum non conveniens - Proper forum - Relevancy of the place where cause of action arose in determining jurisdiction and more convenient forum - Who were the material witnesses - Documentary evidence - Whether evidence relevant to the action will be those related to the sunken vessel or those related to the insurance policy - Financial capacity of defendants considered in determining proper forum - Whether High Court of Malaya in Kuala Lumpur or High Court of Sabah and Sarawak at Miri more covenient forum*

The defendants applied for the plaintiff's action to be set aside on the ground that the High Court of Sabah and Sarawak at Miri has no jurisdiction to try this action and that it should be tried in the High Court of Malaya at Kuala Lumpur, which not only has jurisdiction, but is also the most covenient forum for its disposal.

The plaintiff who owned a vessel, operates its business from a registered office in Miri. The defendants run an insurance business from their headquarters situated in Kuala Lumpur. By a marine insurance policy, the defendants agreed to insure some insurable interests of the vessel against the perils as stated in the policy. While the policy was still in force, the vessel sank and was totally lost by the perils of the sea. The plaintiff subsequently lodged an insurance claim for their loss at the defendants' headquarters in Kuala Lumpur. Thereafter, the plaintiff initiated this action against the defendants for failure or neglect to pay the plaintiff the sum insured under the policy for the loss of vessel. Subsequently the defendants by a letter addressed to the plaintiff's solicitor, repudiated liability in respect of the claim.

For the plaintiff, it was submitted that the High Court in Sabah and Sarawak at Miri has jurisdiction to hear this action for the reason that it had satisfied the requirements of paras. 23(1)(a), (b) and (c) of the Courts of Judicature Act 1964 (the "Act") in that the cause of action arose in Miri, ie the first defendant who is one of the co-insurer, has a place of business in Kota Kinabalu and Kuching which is within jurisdiction of the High Court of Sabah and Sarawak; and also, on the facts on which the proceedings are based, exist or are alleged to have occurred in Miri.

Held:

[1] The act which gave the plaintiff cause of complaint was the defendant's refusal, ommission or unwillingness to pay the sum claimed by the plaintiff under the insurance. The cause of action for insurance claim did not arise on the occurrence of the circumstances as set out in item 67 of the Sarawak Limitation Ordinance as contended by the defendants. The ordinance is only applicable in determining the limitation period within which a suit of the nature described therein is to be instituted and has no application in determining the cause of action of any act complained of.

[2] It is clear that the failure, neglect or unwillingness on the part of the defendants to make the said payment took place at the first defendants's headquarters in Kuala Lumpur, where the claim was lodged. Therefore, the place where the cause of action arose is Kuala Lumpur.

[3] Since the first defendant has a place of business in Kota Kinabalu and Kuching, the High Court of Sabah and Sarawak, by virtue of the circumstances set out in para. (b) of sub-s. 23(1) of the Act, would also have jurisdiction in respect of this action.

[4] It is the view that the place where the cause of action arose or where the premium was paid or policy issued are only relevant in determining jurisdiction, and has no application in determining the most suitable or appropriate forum. The defendants in rejecting the plaintiff's claim alleged that the vessel sank in normal weather conditions due to natural wear and tear which is excluded from the maratime policy coverage. Hence, the material witnesses for this action would be the owner of the vessel and its crew members at the time of the incidents and not the officers and servants of the defendants since there is no evidence to show that the said policy itself was being disputed. Likewise, the documentary evidence that will be relevant to the action will be those related to the vessel and not those related to the policy. Furthermore, as the defendants are financially strong, they can easily absorb any expenses incurred in having this action heard in Miri.

[Defendants' application dismissed with costs.]

Case(s) referred to:

American Express Bank Ltd v. Mohamad Toufic Al-Ozier & Anor [1995] 1 CLJ 273 ***(refd)***

Bunga Lawas Shipping Agencies Sdn Bhd v. Nusantara Worldwide Insurance (Malaya) Bhd & Anor [1999] 2 CLJ 731 ***(refd)***

Dayasar Corporation Sdn Bhd v. CP Ng & Co Sdn Bhd (In Receivership) [1990] 1 CLJ 263 ***(refd)***

Distillers Co (Bio-Chemicals) Ltd v. Thompson (by her next friend Arthur Leslie Thompson) [1971] 1 All ER 694 ***(refd)***

Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 ***(refd)***

Lam Kok Trading Co (Pte Ltd) & Anor v. Yorkshire Switchgear & Engineering Co Ltd [1976] 1 MLJ 239 ***(refd)***

Malacca Securities Sdn Bhd v. Loke Yu [1998] 2 CLJ 22 ***(refd)***

Malayan Banking Bhd v. International Tin Council and Another Appeal [1989] 2 CLJ 961 ***(refd)***

Mee Ying Enterprise Jewellers (suing as a firm) v. Che Jah Abdullah [1992] 3 CLJ 1617 ***(refd)***

Sogelease Advance (Malaysia) Sdn Bhd v. Kemajuan Tat Young Sdn Bhd & Ors [1999] 5 CLJ 331 ***(refd)***

Sykt Nip Kui Cheong Timber Contractor v. Safety Life & General Insurance Company Sdn Bhd [1975] 2 MLJ 115 ***(refd)***

Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(a), (b), (c), (d)

Rules of the High Court 1980, O. 12 r. 7

Sarawak Limitation Ordinance, item 67

For the plaintiff - Victor Wong (Tong Kah Lai); M/s Victor Wong & Chiew

For the defendants - Jimmy HT Wee; M/s Jimmy HT Wee & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Sulaiman Daud JC:

This is an application by the 1st, 2nd, 3rd and 4th defendants (collectively referred to as "the defendants") under O. 12 r. 7 of the Rules of the High Court 1980 for this action to be set aside or transferred to the High Court of Malaya at Kuala Lumpur on the ground that the High Court of Sabah and Sarawak at Miri has no jurisdiction to try this action and that the action should be tried in the High Court of Malaya at Kuala Lumpur which not only has jurisdiction to try this action but also as the most convenient forum for its disposal.

The defendants have also filed a similar application in respect of Civil Suit No. 22-99-99(MR) (encl. 12 therein) where the facts and the prayers are

substantially similar to the present application. Both parties have agreed that the decision of this application will be binding on the other application.

Briefly the facts of the case are as follows. The plaintiff is the owner of the vessel called the Daya Cipta ("the vessel") and has its place of business and registered office at Miri. The defendants are carrying out insurance businesses and have their headquarters in Kuala Lumpur. By a marine insurance policy dated 17 July 1997 made between the plaintiff and the defendants ("the said policy"), the defendants agreed to insure the hull and machinery of the vessel against the perils as stated in the policy. On or about 4 December 1997, the plaintiff alleged that while the policy was still in force, the vessel was sunk and totally lost by the perils of the sea. On 23 January 1998 the plaintiff, through MMS Miller (Insurance Brokers) Sdn. Bhd. ("the insurance broker"), lodged an insurance claim for the vessel with the defendants at the first defendant's headquarters in Kuala Lumpur. On 13 August 2000 the plaintiff took out this action for the failure or neglect of the defendants to settle and pay to the plaintiff the sum insured under the said policy in respect of the said loss. Subsequently the defendants through its solicitor in Singapore, by a letter dated 2 September 1999 addressed to the plaintiff's solicitor in Miri repudiated liability in respect of the claim.

In the course of the hearing of this application the defendants withdrew the alternative prayer to have the action transferred to the High Court of Malaya at Kuala Lumpur for the obvious reason that the High Court of Malaya and the High Court of Sabah and Sarawak have distinct territorial jurisdiction and is not vested with any power to transfer proceedings from one jurisdiction to another (see *Fung Beng Tiat v. Marid Construction Co* [1997] 2 CLJ 1).

Having disposed one of the alternative prayer, the next question for determination is whether the High Court of Sabah and Sarawak or the High Court of Malaya or both have jurisdiction to hear this action. The civil jurisdiction of the High Court of Sabah and Sarawak and that of the High Court of Malaya is provided in sub-s. 23(1) of the Courts of Judicature Act 1964 ("the Act"), which provides as follows:

> 23.(1) Subject to the limitation contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
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> (a) the cause of action arose; or
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> (b) the defendant or one of the several defendants resides or has his place of business; or
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed is situated, within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

On the issue of jurisdiction the learned counsel for the defendants contended that jurisdiction for this action is with the High Court of Malaya at Kuala Lumpur and in support thereof he gave the various grounds as stated in the affidavits affirmed by Johari Nordin which can be summarised as follows, that is firstly the defendants' place of business is in Kuala Lumpur, secondly the policy to which this application relates was issued in Kuala Lumpur, thirdly the premium thereof was paid by the plaintiff to the defendants in Kuala Lumpur, fourthly the claim was lodged by the insurance broker at the headquarters of the defendants in Kuala Lumpur. He also contended that there are no factors existing in the plaintiff's action to confer jurisdiction on the High Court of Sabah and Sarawak at Miri.

For the plaintiff, on the other hand, it was submitted that the High Court in Sabah and Sarawak at Miri has jurisdiction to hear this action for the reason that it has satisfied the requirements of paras. 23(1)(a), (b) and (c) of the Act in that the cause of action arose in Miri, the first defendant who is one of the co-insurer has a place of business in Kota Kinabalu and Kuching which is within the jurisdiction of the High Court of Sabah and Sarawak and the facts on which the proceedings are based exist or are alleged to have occurred in Miri.

Two points clearly emerged as issue in this matter, that is whether the High Court of Sabah and Sarawak at Miri had jurisdiction to hear the action so filed, and secondly whether the said High Court was or was not a *forum non conveniens*, that is the most appropriate forum.

Whether The High Court Of Sabah And Sarawak At Miri Has Jurisdiction

It is well settled that in determining the jurisdiction of the High Court as provided in sub-s. 23(1) of the Act, paras. (a), (b), (c) and (d) thereof must be read disjunctively (see *Malayan Banking Bhd v. International Tin Council and Another Appeal* [1989] 2 CLJ 961, *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 2 CLJ 22 and *Mee Ying Enterprise Jewellers (suing as a firm) v. Che Jah Abdullah* [1992] 3 CLJ 1617). In *Sogelease Advance (Malaysia) Sdn Bhd v. Kemajuan Tat Young Sdn Bhd & Ors* [1999] 5 CLJ 331 where the cause of action arose in the State of Malaya but the defendants resided or have their place of business in Sarawak, it was held that the High Court of Malaya has jurisdiction by virtue of para. (a) of sub-s. 23(1) of the Act and that the High Court of Sabah and Sarawak has jurisdiction by virtue of para. (b) of the said subsection.

It is the contention of the plaintiff's counsel that the cause of action herein is the defendants' refusal or neglect or unwillingness to pay or make payment for the sum insured in the marine insurance which the plaintiff alleged to be in breach or in default of the terms thereof. The plaintiff's counsel submitted that the cause of action arose in Miri since the repudiation of the defendants' liability was communicated by the defendants' solicitor in Singapore to the plaintiff in Miri by the letter dated 2 September 1999. In support thereof the learned counsel referred to *Distillers Co (Bio-Chemicals) Ltd v. Thompson (by her next friend Arthur Leslie Thompson)* [1971] 1 All ER 694, *Lam Kok Trading Co (Pte Ltd) & Anor v. Yorkshire Switchgear & Engineering Co Ltd* [1976] 1 MLJ 239.

The learned counsel for the defendants, on the other hand, submitted that pursuant to item 67 of the Sarawak Limitation Ordinance, the cause of action in an insurance claim arises not when liability is repudiated but when the proof of loss is given to or received by the defendants, that is when the plaintiff lodged a claim for the loss on the defendants in Kuala Lumpur. He further submitted if the cause of action arose in Miri by reason that the letter repudiating the liability of the defendants was sent to the plaintiff's solicitor in Miri, then this action is premature because the said letter was only sent to the plaintiff's solicitor on 2 September 1999, which was after the initiation of the action herein.

I agree with the learned counsel for the plaintiff that the act which gave the plaintiff the cause of complaint was the defendants' refusal, omission or unwillingness to pay the sum claimed by the plaintiff under the insurance. With due respect I cannot agree with the defendants' counsel that the cause of action for insurance claim arose on the occurrence of the circumstances as set out in item 67 of the Sarawak Limitation Ordinance since the said ordinance is only applicable in determining the limitation period within which a suit of the nature described therein is to be instituted and has no application in determining the cause of action of any act complained of.

In *Bunga Lawas Shipping Agencies Sdn Bhd v. Nusantara Worldwide Insurance (Malaya) Bhd & Anor* [1999] 2 CLJ 731 the plaintiff lodged a claim with the defendants, the co-insurer of a vessel owned by the plaintiff, for the loss of the said vessel. The defendants, which have their registered office in Kuala Lumpur, by a letter addressed to the plaintiff at its place of business in Miri informed the plaintiff that the claim was rejected. It was held that the repudiation of the plaintiff's claim by the defendants was the act that gave the plaintiff its cause of complaint. The learned counsel for the plaintiff argued that in the present action the repudiation was communicated to and received by the plaintiff at its place of business in Miri, hence the alleged breach and the cause of action arose within the local jurisdiction of the High Court of

Sabah and Sarawak at Miri. As to the application of the *Bunga Lawas* case I am in agreement with the defendants' counsel that the fact of that case can be differentiated with the present action as at the time of filing of this action the said repudiation had not been communicated by the defendants to the plaintiff's solicitor in Miri. As such it is obvious that the cause of complaint by the plaintiff was the defendants' refusal, omission or unwillingness to make payment on the insurance claim and not the repudiation thereof.

I am also of the view that the decision and principles laid down in the three cases referred to by the plaintiff, that is the *Distillers Co (Bio-Chemical) Ltd, Lam Kok Trading Co (Pte) Ltd & Anor* and *Sogelese Advance (Malaysia) Sdn Bhd*, did not lend any support to the plaintiff's contention that the cause of complaint of the plaintiff occurred in Miri. The decisions in those cases were made according to the peculiar facts and issues raised therein which can be easily distinguished from the facts of this action. As to the place where the cause action arose it is clear that the failure, neglect or unwillingness on the part of defendants to make the said payment took place or occurred at the first defendant's headquarters in Kuala Lumpur, where the claim was lodged. My decision would be different if this action was filed after the receipt of the said repudiation letter by the plaintiff's solicitor in Miri.

Having decided that the cause of action in the instant case arose in Kuala Lumpur, the next question to be decided is whether the High Court of Sabah and Sarawak at Miri has jurisdiction on any of the other grounds set out in sub-s. 23(1) of the Act. In this action it is obvious that the first defendant, who is one of the co-insurers, has a place of business in Kota Kinabalu and Kuching (see para. 5 of Victor Wong's affidavit affirmed on 26 October 1999, and exh. JN3 of Johari affidavit affirmed on 19 November 1999). It is also clearly indicated in the heading to this action that the address for the first defendant as used by the plaintiff is at 7th Floor, Wisma Perkasa, Jalan Gaya, P.O. Box 13936, Kota Kinabalu. Since the first defendant, being one of the several defendants, has its place of business both in Sabah and Sarawak, the High Court of Sabah and Sarawak, by virtue of the circumstances set out in para. (b) of sub-s. 23(1) of the Act, would also have jurisdiction in respect of this action. In discussing the territorial jurisdiction of the High Court of Malaya and the High Court of Sabah and Sarawak, Gopal Sri Ram JCA, in the case of *Fung Beng Tiat v. Marid Construction Company* said at pp. 7-8:

> First, it is crystal clear from Art. 121 of the Federal Constitution that there are two separate High Courts in Malaya exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court of Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory.

In *Sykt Nip Kui Cheong Timber Contractor v. Safety Life & General Insurance Company Sdn Bhd* [1975] 2 MLJ 115 Hashim Yeop Sani J (later Chief Justice, Malaya) in dealing with territorial jurisdiction observed that:

> It is all too clear that both the High Court in Malaya and the High Court in Borneo have separate and distinctive territorial jurisdiction. Article 121(1) of the Constitution speaks of the two High Courts having "co-ordinate jurisdiction" and the definition of "territorial jurisdiction" in the Courts of Judicature Act 1964 speaks of the territorial jurisdiction of the two High Courts.

From the above it is clear that reference to jurisdiction in sub-s. 23(1) of the Act is a reference to either the territorial jurisdiction of the High Court of Malaya or the High Court of Sabah and Sarawak. If one of such High Court has jurisdiction over any cause or matter it shall necessarily follow that any branch of the High Court within the same territorial limit shall likewise have jurisdiction thereon. In the circumstances I hold that the High Court at Miri have jurisdiction in this action as the first defendant has its place of business in the territorial jurisdiction of the High Court of Sabah and Sarawak.

The Question Of *Forum Non Conveniens*

Having ruled that both the High Court of Sabah and Sarawak and the High Court of Malaya have jurisdiction in this action I will now deal with the question of *forum non conveniens* as raised by the defendant's counsel. On this issue the learned counsel for the defendant submitted that even if the court find that the High Court in Miri has jurisdiction the action may be tried more suitably or conveniently in the High Court of Malaya at Kuala Lumpur. It is obvious that the learned counsel submission is based on the doctrine of *forum non conveniens* as adopted by the Supreme Court in the case of *American Express Bank Ltd v. Mohamad Toufic Al-Ozier & Anor* [1995] 1 CLJ 273. In that case Peh Swee Chin SCJ (as his Lordship then was) in delivering the judgment of the court said at p. 280:

> As indicated, having such jurisdiction was not the end of the matter; the foreign bank applied to set aside the leave granted *ex parte* earlier to issue and serve the writ of summons out of jurisdiction. The High Court would have to consider, next, to exercise its discretion on the doctrine of *forum non conveniens* as to whether to allow or not, the application of the foreign bank, in this case, to set aside the leave to issue and serve out of jurisdiction on the foreign bank granted earlier under O. 11 r. 1 of the RHC to the bank customers.
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> The doctrine of *forum non conveniens* appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v. Consulax Ltd (The Spiliada)* [1986] 3 All ER 843 after a series of decisions, as described and set out so well in that very interesting and readable joint article by *RH Hickling and Assoc. Prof Wu Min Aun* [1994] 3 MLJ xcvii. The main judgment in the *Spiliada* was delivered by Lord Goff,

a who adopted the *dictum* of Lord Kinnear in *Sim v. Robinow* [1892] 19 R (ct. of Sess.) 665, 668 as being the fundamental principle in regard to this doctrine i.e. that "there is some other tribunal, having competent jurisdiction, in which, the case may be tried more suitably for the interests of all parties and for the ends of justice." Lord Goff cautioned that the word "conveniens" in *forum non conveniens* meant suitability or appropriateness of the relevant b jurisdiction and not one of convenience. We are in entire agreement with the fundamental principle so expressed.

It is observed that in both the *American Express* and the *Spiliada* case the doctrine of *forum non conveniens* was applied where both local and foreign c tribunals have jurisdiction over the case in question. However this doctrine has also been adopted in this country where the choice is between two branches of the High Court having concurrent jurisdiction (see *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268) and between two High Courts with distinct and competing jurisdiction (*Dayasar Corporation Sdn Bhd v. CP Ng & Co Sdn Bhd (In Receivership)* [1990] 1 CLJ 263.

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In the light of the principle laid down in the *Spiliada* case I will now determine whether the High Court of Malaya at Kuala Lumpur or the High Court of Sabah and Sarawak at Miri is the most suitable or appropriate forum for the purpose of this action.

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It is the contention of learned counsel for the defendants that the High Court of Malaya at Kuala Lumpur is the more suitable and appropriate forum because the cause of action arose in Kuala Lumpur, all the defendants have their principle place of business in Kuala Lumpur, the policy was issued in Kuala Lumpur, the defendants' principle witnesses will be from Kuala Lumpur. The f said counsel also argued that the defendants would be put to extensive costs, expense and inconvenience in defending the action in Miri.

On the other hand the learned counsel for the plaintiff submitted that the plaintiff had a *prima facie* right to choose where to file the action and the g choice should not be interfered with except perhaps on clear ground of injustice or inconvenience. The learned counsel also contended that the defendants are established insurance companies which are financially strong and sound and that the first defendant, who has been duly authorised by the other defendants to act for them, have branches in Sabah and Sarawak as compared to the plaintiff who is geographically limited to Miri in term of its business and place h of operation without any place of business in the State of Malaya. The plaintiff's counsel also argued that the plaintiff does not have the financial support comparable to that of the defendants and it is less costly and far more less convenient for the plaintiff to have this action heard in the High Court of Sabah and Sarawak at Miri and further all the material witnesses are i residing in Miri.

On the submission of the defendants I am of the view that the place where the cause of action arose or where the premium was paid or policy issued are only relevant in determining jurisdiction but has no application in determining the most suitable or appropriate forum. The defendants in rejecting the plaintiff's claim alleged that the vessel sank in normal weather conditions due to natural wear and tear which is excluded from the maratime policy coverage. Hence the material witnesses for this action would be the owner of the vessel and the crew members of the vessel at the time of the incidents and not the officers and servants of the defendants since there is no evidence to show that the said policy itself being disputed. Likewise the documentary evidence that will be relevant to the action will be those related to the vessel, including the record of its maintenance and not those related to the policy as contended by the defendants' counsel. I also agree with the plaintiff's counsel that the defendants which are financially strong and sound can easily absorb any expenses incurred in having this action heard in Miri and furthermore the first defendant which has been given the mandate by the other co-insurers to deal with this action has a main branch each in Kuching and Kota Kinabalu.

With regard to the plaintiff's right to choose the forum where to file the action as raised by the plaintiff's counsel above, it is worthy of noting the comment made by Lord Goff in the *Spiliada* case, where his lordship, at p. 855, said as follows:

> ... Such indeed appears to be the law in the United States, where "the court hesitate to disturb the plaintiff's choice of forum unless the balance of factors is so strongly in favour of the defendants" (see *Scoles and Hay Conflict of Laws* (1982) p. 366, and cases there cited); and also in Canada, where it has been stated that "unless the balance is so strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed" (see *Castle Conflict of Laws* (3rd edn 1974) p 282). This is strong language. However the United State and Canada are both federal states; and, where the choice is between two competing jurisdiction within a federal state, it is readily understandable that strong preference should be given to the forum chosen by the plaintiff on which jurisdiction have been conferred by the constitution of the country which includes both alternative jurisdiction.

I am of the view that the observation aforesaid can also be adopted in approaching the question of appropriate and suitable forum between the distinct jurisdiction of the two High Courts in this country.

For the reasons given, I dismissed the defendants' application with cost.